

# Order

Michigan Supreme Court  
Lansing, Michigan

June 14, 2011

Robert P. Young, Jr.,  
Chief Justice

ADM File No. 2008-36

Michael F. Cavanagh  
Marilyn Kelly  
Stephen J. Markman  
Diane M. Hathaway  
Mary Beth Kelly  
Brian K. Zahra,  
Justices

Proposed Amendment of  
Rule 7.202 of the Michigan  
Court Rules or Proposed Adoption of  
Administrative Order No. 2011-XX

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On order of the Court, this is to advise that the Court is considering two alternative proposals. Alternative A is a proposed amendment of Rule 7.202 of the Michigan Court Rules. Alternative B is a proposed administrative order. Before determining whether either alternative should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm](http://www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm).

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text  
is shown by strikeover.]

## ALTERNATIVE A

Rule 7.202 Definitions

For purposes of this subchapter:

(1)-(5)[Unchanged.]

(6) “final judgment” or “final order” means:

(a) [Unchanged.]

(b) In a criminal case,

(i) an order dismissing the case;

- (ii) the original sentence imposed following conviction;
- (iii) a sentence imposed following the granting of a motion for resentencing;
- (iv) a sentence imposed, or order entered, by the trial court following a remand from an appellate court in a prior appeal of right; ~~or~~
- (v) a sentence imposed following revocation of probation; or
- (vi) an order suppressing or excluding substantial and material evidence, upon certification by the prosecuting attorney that the evidence is essential to the prosecution of the case. If an appeal following such a certification results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing the appeal.

### **ALTERNATIVE B**

Proposed Adoption of  
Administrative Order No. 2011-X  
(Stay of Proceedings on  
Appeal from Orders Suppressing  
Prosecution Evidence)

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On order of the Court, the following order is effective XXXXXX, 2011.

The issue of how to proceed on appeal in a criminal case in which the trial court has ordered suppression of a prosecutor's evidence has created occasional problems for courts and litigants. A prosecutor whose evidence is suppressed may wish to appeal that ruling. However, if the trial court or the Court of Appeals refuses to grant a stay while resolution of the appeal from the suppression order is pending, the case would proceed to trial without the suppressed evidence. This is a problem because jeopardy attaches when the jury is sworn, which then prohibits the case from being retried if the trial court's

determination would have been overturned on appeal. Prosecutors have dismissed cases before appealing the suppression decision to avoid this double jeopardy problem. If the case is voluntarily dismissed, appellate courts no longer have jurisdiction to consider the underlying appellate issue whether the trial court correctly suppressed the evidence.

To encourage efficient consideration of appellate issues and prompt determination of appeals of lower court suppression orders, the courts of this state should be allowed to consider appeals of suppression orders. Therefore, in a criminal case in which a prosecutor's evidence has been suppressed, and where the prosecutor desires to appeal that ruling, the trial court or Court of Appeals shall grant a stay of proceedings at the request of the prosecutor, pending resolution of the prosecutor's application for leave to appeal. The prosecutor must pursue the appeal as expeditiously as practicable, and the Court of Appeals shall consider the matter under the same priority as that granted to an interlocutory criminal appeal under MCR 7.213(C)(1). If the defendant is incarcerated, the defendant may request that the trial court reconsider whether pretrial release is appropriate.

Staff Comment: Alternative A, the proposed amendment of MCR 7.202 would establish that an order suppressing material and substantial evidence is considered a final order, and therefore subject to an appeal by right. By contrast, Alternative B, a proposed administrative order, would establish a right to a mandatory stay while a prosecutor pursues interlocutory appeal of a trial court's decision to suppress a prosecutor's evidence. These proposals were prompted by the Court's decision in *People v Richmond*, 486 Mich 29 (2010), in which the Court held that a prosecutor's decision to move to dismiss the prosecutor's case makes the case moot on appeal.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or [MSC\\_clerk@courts.mi.gov](mailto:MSC_clerk@courts.mi.gov). When filing a comment, please refer to ADM File No. 2008-36. Your comments and the comments of others will be posted at [www.courts.mi.gov/supremecourt/resources/administrative/index.htm](http://www.courts.mi.gov/supremecourt/resources/administrative/index.htm).



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 14, 2011

*Corbin R. Davis*  
Clerk